

Consumers Get State Classes Certified In Bayer Vitamin Row

By **Shayna Posses**

Law360, New York (November 16, 2017, 5:43 PM EST) -- A California federal judge on Wednesday certified several state classes of consumers in litigation challenging the labeling of Bayer AG's One A Day vitamins, but found that the shoppers leading the suit didn't meet the burden for a nationwide class in an order that also rejected the company's quick win bid.

U.S. District Judge William H. Orrick concluded that California resident Ilana Farar, Florida woman Andrea Lopez and New Yorker Rosanne Cosgrove met the requirements to certify three classes of people who purchased one of Bayer's One A Day branded multivitamins in their respective states, holding, for instance, that the consumers are united by common questions like whether the company falsely advertised the products.

However, the judge stopped short of certifying a nationwide class in the litigation that names the German pharmaceutical company and two subsidiaries. Judge Orrick noted that while neither side gave the issue much attention in their briefs, Bayer said the nationwide class didn't meet predominance requirements because the laws of all 50 states would apply, while the shoppers countered that California law should apply to the nationwide claims.

Ultimately, Judge Orrick said he couldn't agree with the consumers because they failed to show California has sufficient contacts to each class member's claims, saying they merely stated without evidence that Bayer has places of business in the state and much of the misconduct occurs there, which isn't enough to satisfy due process.

But the judge told Bayer to revisit its arguments as well because the issue could come up again, and "defendants too fail to meet their burden to show that foreign law, rather than California law, should apply to class members' claims."

The judge also wasn't swayed by Bayer's request for summary judgment, holding that material facts remain in dispute. For instance, Bayer insists that the consumers can't show that the company's claims about its multivitamins are false or misleading, focusing on testimony from Dr. Edward Blonz — one of the shoppers' experts — that it says confirms that the vitamins do provide health benefits, according to the judge.

But Judge Orrick found that the company selectively quotes from Blonz's testimony, which is, in fact, consistent with his expert report and supports the consumers' contention that the products provide no measurable benefit to the average American.

The litigation dates back to 2014 when Farar and another consumer who ultimately dropped out of the suit filed a proposed class action alleging that Bayer overstepped its bounds with promises that its One A Day vitamins would benefit anyone who takes them by boosting heart health, immunity and physical energy.

The consumers bought the supplements based on these claims, but as it turns out, the vitamins only benefit people who are vitamin-deficient, which most Americans are not, according to the suit.

Bayer has made several attempts to escape the action, leading to two amended complaints.

However, last time around, Judge Orrick sided with the consumers, **holding in August 2015** that they had met their pleading burden with regard to assertions that Bayer's heart health and immunity claims are false or misleading by citing National Institutes of Health fact sheets and other reports.

This year, the parties have been tussling over the consumers' motion for class certification and Bayer's summary judgment request, both of which were addressed at an **October hearing**.

Bayer attorney Jonathan F. Cohn of Sidley Austin LLP told Judge Orrick that the plaintiffs' whole case was built on their contention that the vitamins were worthless, but the argument was undermined by Blonz's admission that the supplements do have health benefits for consumers who get less than the recommended daily amount of vitamins.

Judge Orrick complimented Cohn on his deposition performance, but disagreed that the concessions were enough to completely undo the Blonz's opinion or to toss the whole case. He did wonder whether the concessions countered the suit's bid for a full refund, but ultimately decided otherwise Wednesday, saying the consumers have plausibly pled at this point that shoppers buy the vitamins for the purported health benefits and thus receive no value.

The judge did, however, stick with his initial thoughts about class certification. During the hearing, he had said he was unlikely to certify a nationwide class but might allow class claims to move forward in the trio of states, which is exactly what he did Wednesday.

Laurence D. King, who represents the consumers, told Law360 in a Thursday email, "Plaintiffs are extremely pleased with the court's decision, and look forward to a trial on the important consumer protection issues presented by this case."

Representatives for Bayer didn't immediately return a request for comment.

The consumers are represented by Laurence D. King, Linda M. Fong and Robert N. Kaplan of Kaplan Fox & Kilsheimer LLP, and Matthew J. Zevin of Stanley Law Group.

Bayer is represented by Jonathan F. Cohn, Benjamin M. Mundel and Ryan Sandrock of Sidley Austin LLP.

The case is Farar et al. v. Bayer AG et al., case number 3:14-cv-04601, in the U.S. District Court for the Northern District of California.

--Additional reporting by Cara Bayles, Steven Trader and Sindhu Sundar. Editing by Adam LoBelia.